The Ideal and the Everyday

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The Problem of Moral Inspiration

Life, at least in the hands of human beings, and very probably in those of other creatures as well, is a notoriously difficult business. So far, so obvious, you might say, yet it seems to me that there is rather more to the observation than might at first appear to be the case, given its familiarity, something at once significant and not particularly familiar.[1] On the one hand, it is of course obvious to any of its participants that life is difficult: that fact is something we know perfectly well, so well as to make it seem banal. On the other hand, and despite its obviousness, the fact remains mysterious, elusive, and what is more, something of an affront. We tend to think that in an ideal world it would not be this way, that our lives are as hard as they are as the result of misfortune, or injustice, or our own failings, physical or psychological, or more realistically, of all those factors operating together, reinforcing one another. In principle we feel, things should not be this way. We strain daily to make them otherwise. Yet upon examination the difficulty that we experience seems in fact to be traceable to the very core of our existence as rational creatures, in which our condition as creatures is as significant as our rationality.

In even the most straightforward situations in our everyday lives it is so often so very hard to know just what one ought to think and what one what ought to do, and the challenge, mysteriously and without rational failing, seems to lie, if only in part and yet inescapably, in the very acts of thinking and doing, to be as much a matter of reflection as of what is reflected upon. So some of the

[1] The you doing the saying here was John Gardner. Death sharpens the need to pay tribute.

difficulty that we experience undoubtedly stems from conflicts of values in the options before us, the sorts of things that afterwards give rise in us to a tempered species of regret, as we seek to reconcile, as best we can, the returns from what we have committed ourselves to and the losses that are attendant upon it, always in full awareness that reconciliation is just as unavailable to us as the values are in conflict. Life as we know it is fraught partly because of reasons like that, reasons that are a function of what is reflected upon, whether before or after the fact. Yet there is more, and it runs to the architecture of decision-making itself, as to which we seem not only to be but always to have been ambivalent, and that because we are rationally rather than psychologically bound to be so. Just what is it that makes rational decision so troubling and so vulnerable? Just what makes it go wrong?

Sometimes our decision-making is liable to be flawed for reasons that we can anticipate or at least recognize after the fact. Perhaps we are overly emotional: in my youth, when I was a hot-metal typesetter, I used to walk very slowly away from a cranky piece of machinery, to the end of a long room, and then slowly back again, as slowly as was necessary for my frustration to subside. Perhaps we are overly focussed on ourselves, or what is much the same thing, on values and interests that we have special experience in and affinity for. In such cases we archetypically try to step back, detach ourselves from our commitments, put ourselves in the shoes of others, so as to see the world as others see it, or more precisely, as it would be seen by others as detached as we have sought to make ourselves. Most profoundly, however, even when reflecting on matters that concern only ourselves, and even when in full command of our emotions, we often continue to approach moral judgment in terms of abstraction, disengagement, and detachment. Distancing yields a clearer understanding, we tell ourselves. When we adopt this perspective we treat the very fact of the particular as morally distracting, thus warranting the most radical and dramatic form of disengagement from the everyday in our decision-making. In each of these cases a different

species of detachment from the particular expresses a different view as to what constitutes moral distraction, against which moral judgment needs to be secured and insulated, ranging from the emotional, to the prudential, to the phenomenal. In all of them, moral judgment is regarded as characteristically vulnerable to the corruptions of the everyday. Our efforts become directed toward its corresponding purification.[2]

In an ideal world none of these distractions would exist for us, or more precisely, for the fact of decision. Of course, we do not live in anything like an ideal world, and yet the tantalizing question, which assumptions about the ideal tend to pre-empt, is how far that is actually a bad thing, as the association of moral reflection and abstraction suggests, and how far a good; how far a falling away from what one ought to think and do, and in that sense a source of regret and reproach, and how far a source of value, or more plausibly perhaps, of both those things at once. Put at its most bluntly, would an ideal world be entirely a better world? What kind of scope and existence would it offer to the moral? Granted that the everyday is morally vulnerable, is that vulnerability an inescapable function of the everyday, as our practices of detachment treat it, or a possible function? In short, is the everyday a sufficient condition of moral vulnerability or just a necessary one? Most provocatively, and to the opposite effect, might the everyday be a source of moral insight, and if so is the moral insight a function of its moral vulnerability, and vice-versa? Is what makes the everyday morally vulnerable an aspect of what makes it morally worthwhile? Does it enable us to live better than we could live in Utopia, in certain respects at least, that is,

[2] Here and in what follows I use the word moral to refer to what reason and value expect, not only of humans but of all that is capable of rational response, as to which of course there are many different accounts. What I seek to outline in this paper is largely independent of the correctness of any one account, although it will be clear that my own convictions are realist and pluralist.

not in the sense that the ideal can be improved upon, but in the sense that it can be enlarged and enriched?

Challenges to at least some of the practices of detached judgment are all too familiar, and in many cases more than a little tired. It is often alleged that the account of morality that such practices give rise to is not fit for humans, indissolubly grounded as humans are in various dimensions of their particularity, to which it is as often replied that it is not the role of morality to fit the human condition, but rather the role of the human condition to fit morality. Both the allegation and the response are silent as to the possibility that the moral might in part be constituted by the human, so as to make a degree of fit between the two inevitable without being necessary, present in some settings but not everywhere. That fit, as and when it arose, would simply be a reflection of the human contribution to the scope of the moral, a legacy of the origins of certain dimensions of morality, not a consequence of subsequent accommodation of them to the human predicament.

Questions like these underpin an almost entirely contrary but no less familiar approach to decision-making. Disengagement is not our only or even our most common method of reasoning about goodness and value, so as to know best what to think and how to act. More often perhaps, we get stuck in. In many settings it is taken for granted that depth of engagement is crucial to the grasp of value. Perhaps the most ready example is that of skilled labour. My brother once had a summer job cleaning floors at the printing bureau in what is now Gatineau.[3] His boss, M. Nault (Dr No to his subordinates) insisted that handling a wet mop properly, so as to clean a surface fluently and effectively, was a skill that took many years to perfect. Some, including my adolescent brother, would disagree on the amount of time needed in that particular case, but all but the very young recognize that there are very few

[3] What was then Hull, Quebec, a sister city to Ottawa, where my brother and I grew up.

activities that it does not take years to learn to do well, and some, such as art, or music, or philosophy, or fine craftsmanship, that it takes most of a lifetime to begin to master. Modern employment implicitly recognizes this in the investment it has made in forms of artificial intelligence (starting with the word processor) that have stripped the nuances from the work done by the living so as to make it both more easily acquired and correspondingly less valuable, and so as much less expensive for the employer as expense correlates with ease of acquisition and value.

An equally familiar example is that of personal relationships, some intimate, others less so, some with human beings, others with other living creatures, in which not only is depth of engagement typically crucial to the delicacy that is in many cases necessary to successful interaction, but emotion must often be to the fore in most aspects of one's dealings if the value of the relationship is to be properly registered, as it must be if it is to yield itself up in all its possible richness. So one usually needs to know just whom one is dealing with and to feel the appropriate emotions toward them on the appropriate occasions in order to value them just as one should. Such knowledge can only be acquired through engagement, and often deep engagement at that. Hence the complaint about impersonal workplaces. Many interactions founder because one is simply not in a position to know enough to see that they flourish in the special ways that the characters of the participants call for. Very often we simply do not know enough about one another's needs and aspirations to be able to respond to them with the sensitivity and dexterity they deserve, so that our lack of knowledge gives rise to moral failing.

Dispassion is so commonly linked to soundness of judgment that many have come to regard the emotions as inherently rationally suspect. Yet this is clearly not so, even in what appear to be the most straightforward cases. It is plainly a good idea to walk slowly down a long room, away from a cranky piece of machinery, so as to allow one's frustration to subside, just to the extent that

one's frustration is liable to be destructive of a solution to the problem at hand, or worse. As I was warned from my first day on the job, force in general and hammers in particular do not mix with cast iron equipment. Yet frustration is very frequently the trigger for inspiration. Without frustration we would be much less likely to be inventive, much more likely to keep on trying the same things. There is always a balance to be struck, I learned, between patient persistence and starting afresh from another perspective, and a suitable level of frustration is a vital part of that balance. The same is true for a wide range of other emotions. Decision-making often depends on emotional investment for its soundness.

Finally and most broadly, it is thought by some (most notoriously Aristotle) that moral understanding of nearly every kind characteristically requires time, experience, and appropriate attention to granularity to master, so that one learns with practice, from one's elders, and in detail, and philosophizes only with age. To invert the earlier proposition about detachment, in each of these cases a different species of engagement in the particular expresses a different view as to what constitutes moral comprehension, in terms of which moral judgment needs to be undertaken, ranging from the emotional, to the prudential, to the phenomenal.

One prominent and, for legal audiences, relevant case of this attention to engagement is the practice of law as it takes place in and through the hands of barristers and solicitors (as well as trial judges, who are in a similar position), whose task it is to acquire the accomplishment necessary to bring together law and fact in such a way, from setting to setting, as to serve best the needs of particular clients. I was once a government adviser on constitutional law, expected (predictably) to be expert in certain clauses of the constitution, but also (perhaps less predictably) to become highly versed, through close engagement in working partnerships, in the missions of certain government ministries, so as to be able to offer appropriate guidance as to the demands of the

same constitutional provisions (such as the right to privacy) in very different policy settings (from housing, to transport, to health care). A good lawyer, I was taught, quite carefully and in close detail, is one who not merely points out problems but goes on to provide solutions, and for a government lawyer such as myself that meant being able to grasp what privacy might call for in relation to a criminal search, for example, as opposed to an administrative inspection. My task as counsel was of course roughly to anticipate what an appellate court might call for, but within the scope which that gave rise to (bearing in mind the open texture of the constitution and the predilections of the locally prevailing judicial culture) to do so in a way that was rather more accessible, sensitive, and nuanced than any court, particularly an appellate one, could hope to be, distanced as judges rightly are from many features of everyday political life, so as to realize a value for a client that a judge would be liable to realize ineptly, or at least less well.

The standard challenge to such ways of implementing principle, and one that was regularly put to lawyers whose advice ran contrary to the democratic will, or stood in for it (the will that had called for a search that lawyers advised could not be undertaken in quite that way), was that these modes of settlement are corrupt by reason of their very lack of distance. Their received character led them to be regarded as the views of the establishment, insufficiently attentive to new ways of thinking, minority interests, and the politically unwelcome. Any good lawyer, we were told by left and right, should leave these questions to the courts, and the courts themselves should become more genuinely neutral in their composition, thought and operations than their critics at the time took them to be. The perceived limits of such a project became limits to the perceived wisdom of constitutional entrenchment and the consequent power of the judiciary.

The underlying point here, one that has been made with varying degrees of purchase against committed moralists from Aristotle

onwards, is that engagement appears to licence self-approval, or at least to turn a blind eye to it, to the extent of the engagement, in that it lacks the essential distance that valid criticism is thought to require. On the face of it, of course, claims of that kind are frankly conclusory in their assumption that criticism requires distance. After all that assumption is just what the morally engaged dispute and implicitly put in issue by virtue of their practices, for those practices take themselves to be capable of self-examination. Is the assumption a sound one then? Should we regard it as the aspect of rationality, and legacy of enlightenment, that it presents itself as being? There seems to be good reason to doubt it. As I have just suggested, a good many forms of moral criticism gain proper traction by reason of their degree of embedding, just because and to the extent that it is only possible to be aware of certain dimensions of the moral from an engaged perspective. So skilled workers, or more precisely, those skilled in the comprehension of that work (such as experienced critics, those who are in a position to be connoisseurs of the workmanship whether or not they possess the relevant skill themselves), are best placed to evaluate the work in question. That is just what M. Nault (my brother's boss from a few pages back) had in mind, or at least sought to trade upon, given that his judgment gave every appearance of also being self-serving. The fact that engagement yields corruption of judgment (and M. Nault was employed by the notorious Department of Public Works) does not undermine the fact that it also yields moral insight. Distance makes it impossible to perceive granularity, and granularity is essential to many aspects of moral evaluation.

And yet the opposite is also clearly true. Some things come into view only with distance, just because the shedding of detail is as often morally revealing as it is morally obscuring. Without equating the metaphysics of the material and the moral, think of a photograph that has been taken from a distance and what it does and does not tell us. Structure becomes visible, as do certain dynamics, even as detail is lost, so that we come to see form at the

expense of feature. As it is often put colloquially, and with reference to the moral as much as the material, sometimes the closer we get the less we can see. So we appear to be in a quandary, not with respect to different values, for that would be fairly readily explicable, but with regard to the same values. Hence the ambivalence about how to approach decision-making that I referred to at the outset.

Here is the thought in response. Both sides have simply overstated their case. Neither impartiality nor partiality, the ideal nor the everyday, are either necessary constituents of value, or necessary conditions of access to value. Rather they are necessary constituents, or necessary conditions of access to, certain values only, those in which impartiality or partiality are part of the ground, as a conceptual matter in some cases, and as a matter of the genealogy of certain morals in others. (Think of the value of justice on the one hand, and that of parenting on the other, and their respective associations with impartiality and partiality). They do not play that role in relation to value in general. Indeed they may not even inevitably play that role in relation to values in which they are part of the ground, for the grounds of a value may themselves be mutable to some extent. That means, and in this lies the departure from what I spoke of as the fairly readily explicable, that in all cases other than those in which either partiality or impartiality forms part of the ground, values are susceptible to either impartial or partial rendering, which is the reason that both renderings possess what plausibility they possess as aspects of value in general. Evaluation is itself a practice that falls to be valued, one that yields different values when differently undertaken, rather than a function of the very idea of value, to be executed only correctly or incorrectly, better or worse. It can of course be done wrongly but there are many ways to do it well, each with its own reward. Some of those ways are ones that we can assume, take on as we think fit, others are embedded.

The Problem of the Murdered Testator

Certain legal cases acquire an especially luminous life after their decision, as touchstones for practices of subsequent reflection, sometimes legal, sometimes political, sometimes philosophical, just because there is something deeply resonant about their facts that fits them to turn into parables. I am grateful to Fred Schauer for pointing out to me recently that *Riggs v. Palmer*[4] is one such case, in that it was already famous in legal circles before Ronald Dworkin made it more famous still. As is the case with parables, the facts can be very succinctly recounted.

Francis Palmer, a prosperous farmer, left the bulk of his estate to his grandson Elmer, with a gift over to his two daughters (one of whom was Riggs) should Elmer predecease him without issue. Whether from impatience, or out of anxiety that the will might be altered, Elmer murdered his grandfather and then sought to claim his inheritance. The will had been properly executed, and there was nothing on the face of its terms, or in the terms of the relevant New York statute, to suggest that the murder of the testator was any bar to inheriting under his will. Nevertheless, and surely not very surprisingly, the court denied the inheritance. As the majority put it, Elmer was to be enjoined from using any of the personalty or real estate left for his benefit; the bequest was to be declared ineffective to pass title to him; by reason of the murder he was to be deprived of any interest in the estate left by his

[4] 115 NY 506 (1889). The occasion for Fred's comment was a lecture given by him at the Surrey Centre for Law and Philosophy in May 2018. I should emphasize at once that, unlike Fred, my present interest in Dworkin is meta-ethical rather than jurisprudential. I am simply using his work as an illustration of a meta-ethical outlook that I am attempting to present an alternative to. If I am correct in what I say then there is something very wrong about Dworkin's project, but that payoff is incidental to this paper, not its point. Yet even that is perhaps to overstate the contrast. Each of these approaches illuminates the other, and that is why the structure of this paper alternates between them.

victim; and the testator's two daughters were to be declared the true owners of that estate. The choice of verbs here is significant.

The majority offered two grounds for its decision. The first rested on an interpretation of the New York wills statute which, in accordance with accepted canons of statutory interpretation, was to be read in light of the intentions of the legislator, so as to expand or contract the bare language of the statute, as far as judicial tradition permitted, in order to secure the legislative intention in cases where a literal reading would frustrate it. To permit Elmer to inherit would be to frustrate the very order that the legislators of the wills statute had sought to secure. The majority described this as rational interpretation, and was at pains to point to the many legal precedents for it. The second, alternative ground for decision was that there was a maxim of the common law, nowhere superseded by statute, that no one should be permitted 'to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime'. The equitable character of this maxim is visibly reflected in the *in personam* tones of the court's decision.

Dworkin called upon *Riggs* in aid of his view of jurisprudence on two separate occasions. In 'The Model of Rules' he relied on the majority's second ground of decision to argue that the law contained principles that a rule of recognition, as proposed by Hart, was constitutionally incapable of capturing.[5] Yet it is a little difficult to see how *Riggs* can be read to support that claim. What the majority describes as a maxim of the common law is in fact a familiar equitable maxim (a variant of the clean hands doctrine), and it has always been the function of the law of equity to temper the rigour of the common law, not by contradicting the common law (so as to declare a will invalid that the law regards

[5] This now very famous paper first appeared in the University of Chicago Law Review in 1967 and was later included in *Taking Rights Seriously* (1977).

as valid, or alter its terms in ways not permitted by law) but by imposing personal obligations that prevent people from exploiting the law to inequitable effect. The principle that no one should be permitted to take advantage of his own wrong is by its nature a principle of decision, to be used by adjudicators, and authoritative adjudicators at that (I find it hard to discern any other role for the principle), and its place in the common law, as we now describe it following the fusion of the administration of law and equity, is as well sourced as that of any other law.

In *Law's Empire*[6] Dworkin deepened his critique by drawing upon the majority's first ground of decision to argue that the true meaning of a statute was always to be determined, not simply by reference to the bare language of the statute, as shaped by relevant canons of statutory interpretation, but by reference to what he described as a practice of constructive interpretation, in which a court asks first, which principle or principles fit the law on the question at hand (law here being understood in a pre-interpretive sense) and second, which of those principles that fit makes the law (here being understood in a post-interpretive sense) the best it can be. This practice he called law as integrity. All philosophers of law, he contended, were engaged in the project of determining the grounds of law, and his account of law as integrity was, when evaluated against the relevant benchmarks, consistently superior to Hart's account on that score.

Once again it is a little difficult to see how *Riggs* itself can be read to support that claim, at least without a good deal of *legerdemain*. It is simply not true to say that all philosophers of law are committed to the identification of the grounds of law, as Dworkin understood those. As far as Hart was concerned, identifying the grounds of law (in Dworkin's sense of intellectual inputs) was the task of law-makers, be they the legislature or the judiciary. Hart's

[6] 1986

project, in his delineation of the rule of recognition, was to identify the sources of law, or more precisely, to identify the ways in which the sources of law are identified by legal officials, so as to identify the law-makers whose task it is to consider grounds of law and reach decisions on the basis of them. In Hart's hands, sources, one might roughly put it, are institutional; grounds are inspirational.

There is no trace of dispute in *Riggs* over the content of the rule of recognition as Hart understood it, for all the rules in the case were recognized rules. Dworkin presents the case as a dispute of that kind by insisting on reading into the rule of recognition (as Hart understood it) a level of detail (how to interpret the outputs of a source; how to reconcile the outputs of different sources) that on the whole the rule of recognition could not offer an answer to without undermining its own significance. By this means he turns Hart's question (about the validity of law) into Dworkin's question (of what law should be). This is a sleight of hand that use of the equivocal term 'grounds of law' (which is roughly equivocal between institutional grounds and intellectual grounds) both conceals and enables. In Dworkin's hands, that is to say in his presentation of Hart, the rule of recognition as Hart understood it is called upon to identify the full resources of decision in every case, and to show how those are to be reconciled. This erases the role that Hart intended the rule of recognition to play, and leaves legal positivists no question of validity to answer. Every legal decision becomes a decision about the content of the rule of recognition.

The deeper and more telling question, however, is not whether Dworkin was fair to Hart, a question that Dworkin was not the sort of combatant to be deeply concerned with, but whether the idea of law as integrity possesses the resources needed to identify the grounds of law as Dworkin understood them. By his own admission, Dworkin loved a distinction (they were vessels for his

remarkable intellectual ingenuity) but the distinction between fit and justification is a troubling one, in its operation and ordering. The dimension of fit is troubling just because it precedes and is independent of the question of justification, so presenting for justification principles that have been identified without justification in mind, all of which may be bad ones, in certain settings at least. This may indeed be integrity, but if so it makes clear what the lives of consistently bad people have so painfully shown, that to possess integrity is not necessarily to possess virtue. Less obviously perhaps, the dimension of justification is troubling, not simply because the options presented to it may well be unworthy ones, for that is not its fault, unless and until it succumbs to rationalizing, but because the process of justification, as Dworkin describes it, is not only backward-looking and self-referential, but fundamentally idealizing. An idealizing morality is not capable of doing the good that much of our living calls for, at least, if we are truly to live well (that is, with as much emphasis on the living as on the well) and to be truly justified in our doing so.

The Problem of Living Well

Joseph Raz has recently, and with characteristic power, outlined reasons to believe in the possibility of moral change, by dismantling arguments, most notably that from subsumption, that would limit morality to what can be explained by reference to existing moral understanding.[7] The limitation expressed in subsumption seeks to preserve both realism about morality and what I have called idealism, standardly by taking existing moral understanding to a new and higher level of abstraction, a level that is sufficiently

[7] 'Can Moral Principles Change?' (2017) King's College London Law School Research Paper 2017-40; Oxford Legal Studies Research Paper 58/2017. SSRN: https://ssrn.com/abstract=3024030 or http://dx.doi.org/10.2139/ssrn.3024030

general in its account of value as to be capable of including a value that would otherwise appear to be novel. By this means, it is said, we can come to see that the cases of value that we are well versed in are in fact part of a more capacious category of value than we took them to be, a category that is capacious enough to embrace an apparent outlier. The underlying and even more basic problem being tackled here is that of the recognition of the moral, and Raz is very persuasive in his contention that there are sound ways to recognize the moral other than by subsumption, most notably by analogy.

Raz's project here, not for the first time, amounts to something of a liberation movement, opening our thought, that about moral realism in particular, to possibilities of diversity and change that standard practices of reflection would rule out. My present concern, which is at once sympathetic yet ancillary to his, is to pursue the question of what might be good about such a liberation. What possibilities for our thought and action does the reality of moral change (if that is what it is) give rise to, and in what ways, if any, do those possibilities make our moral lives fuller, or richer, or more recognizable, or all those things at once?

The standard move, toward idealism, abstraction, disengagement in our moral decision-making, is driven by the sense of what the moral has to offer to life, of what we and other valuers need to attend to in and learn from the moral, so as to live well and make our lives genuinely good ones. The less standard move in the opposite direction, one that is not accidentally engrained in many aspects of our daily life, is animated by something less familiar and perhaps less comfortable for a moral realist, a sense of what life has to offer to the moral, so as to bring the moral to life, so to speak, with all that implies in terms of dynamism and finitude. As I see it, each of these two moves, taken in isolation and in general, risks not only incompleteness but inadequacy. The former is liable to be too bloodless, the latter too bloody.

To speak of bringing morality to life risks being both rhetorical and overwrought. On the one hand, morality plainly has a life of its own without need of assistance from the living, in the sense of the flesh and blood living that I have been pointing to. On the other hand, but by something of the same token, to speak of life without more is simply to prompt the question of just what sort of life one has in mind. What kind of life could valuers bring to morality that morality did not already possess? The answer, as I see it, is the kind of life that is implicit in the very idea of valuers and valuing; the life of specificity and finitude that the ideal does not partake of but that makes evaluation matter, indeed makes it conceivable; the life that requires us to think and to do one thing rather than another, and that leaves open-ended the possibilities in doing so; the life that contains the ideas of creation and creativity as its premise and its purpose; the life that makes the moral world one that is dynamic as well as static; the life in which the same things can be good and bad at once; the life the history of which could never be entirely foretold, and that as a result, when brought into being and pursued through its course, in small moments and in great, makes the moral universe rather larger than it would or could have been otherwise, for better and for worse.

That is still quite rhetorical so let me be more down to earth. As I see it at the heart of the idea and the experience of life is a sense of span. We live for a while and within a certain compass. Those parameters are what give life its basic outline, its narrative structure, and less obviously perhaps, its moral imperative. We quite unavoidably, but for the most part quite willingly, proceed from moment to moment, predicament to predicament, in patterns derived from our thoughts and from our actions. Because each of us is one person rather than all persons, because we each exist at one moment rather than another, because we can never be in two places at once, we must decide (if only by way of response to what has happened to us in cases when we are passive) and the quality of our decision turns in part on our finitude and specificity, so that our moral worth, which we cannot control or escape,

turns in part on matters that could not be known in advance, because their character is a product and function of our particular, and very largely randomly established mortality. All of this is very far from ideal, and that is one prominent source of its richness.

We do all these things not on our own but in concert with one another, and as a result our finitudes are multiplied, our moral prospects complicated and enriched, by practices of association. In this way we collectively beget cultures and aspects of culture. To live well in and through these cultures and their aspects very often requires us to master the intricacies of their goodness and badness, intricacies that distance cultures in varying degrees from the ideal and from one another, in their moral successes as much as in their moral failures. So when we pursue a skill, physical or intellectual; have feelings about what we do and where we find ourselves; develop personal relationships with other people, other animals, or even places; in general seek to live well, so as to have what we take to be a good life; we necessarily work within contingencies of time, space, and incident, few of which are entirely or exactly shared with other people at other times and places, (disconcerting though it often is to realize just how far one's life is a type, so that matters that one took to be particular to oneself are revealed as cultural or generational). Far from being morally inert, these contingencies seem to shape deeply our sense of the worth of our lives, the more so the more embedded we become in them, through investment in roles, people, places, and much else, so as to detail, or flesh out as we often and revealingly put it, the contours of our engagement in and appreciation of the artefacts and practices that we share with our moral neighbours and companions, our fellow travellers in the appreciation of value.

To put it at its most trivial, there was a time when there was no wet mop, a time when there was no terrazzo flooring, a time when there was no question of the skill that could be developed, mastered and transmitted to others, and a time, therefore, when there was no question of the aspect of value that such a skill can

give rise to, an aspect of value that in its shadings is not simply an arbitrary variant of a more general and abstract value of cleaning and cleanliness (or something like that), but rather the legacy of a particular moment and culture. Indeed there is probably a sense in which the value (and disvalue) of the practices that my brother stepped into and briefly shared was local to Gatineau, to Public Works, and indeed to the company of M. Nault and his fellows.[8] These are the things that give life its flavour, and there seems no reason to deny and good reason to accept that they form a large part of its value, as they routinely appear to us to do.

The example here is deliberately trivial, just because so much of our lives and their worth are similarly trivial. The point that I am trying to make is one that could be rather more easily established, for this audience at least, by reference to more ambitious practices, such as those of art, music, fine craftsmanship, and intellectual enquiry. Yet that would surely be to slip into something like the habit of elevation and abstraction in our reflections about what to think and how to act that I have sought to call into question, at least far enough to temper somewhat our embrace of it. It isn't just that what are sometimes referred to as the finer things in life are apt to be self-referential in the hands of most philosophers. It is that they are too easily thought of as approaches to and imperfect instantiations of the ideal. That is not the only or best way to understand even these finer things. For those who are as old as I am, or are of an historical turn of mind, and to return to an example that I have relied on elsewhere, there is a Bob Dylan song that seeks to deny that art attains greatness only as and when it partakes of the divine: 'But Mona Lisa must have had the highway blues, you can tell by the way she smiles'.[9] The highway blues: how redolent of value that is, and how very particular in its time, place and ultimate flavour. Even Bob Dylan would have

[8] Returning to the question of skilled labour raised in the text at note 1.

[9] 'Visions of Johanna' (1966)

passed on it a few years later, when Woody Guthrie meant less to him.

The emotions too are often no less local than skilled labour. It is a little difficult to be properly precise here, because to be adept in the emotions is to be deeply versed in their local expression, for a family, for a community, for a national culture, in something the same way as it is to be adept at humour, so that it is as difficult to speak accurately of foreign emotions as it is to speak accurately of a foreign sense of humour. Nevertheless, anyone with experience of different generations and the quintessentially different outlooks that they often have on significant aspects of life, at least in all but the most stable cultures, will be familiar with the fact that such people do similar things in what are often fundamentally different ways, so that the intergenerational unities are quite shallow while their divergences are profound. It is a small and possibly unreliable example, but I remember noticing when young that while my grandparents and parents distinguished as I did (and as we are all bound to) between their positive and negative states of mind, their vocabularies were very different from mine, and the difference in our vocabularies tracked a difference in the quality of our evaluations. My grandparents spoke of joy and sorrow, my parents of happiness and unhappiness, while I at the time tended to speak of being up or down. Different values are at stake here, and to a great extent they are not just culturally rooted but culturally inspired.

I have written elsewhere, in the context of considering the worth of equality, of the distinction that is to be drawn between value (and disvalue) and goodness (and badness). Goodness and badness are reflections of the way we live, of the artefacts that our lives give rise to, including the artefact of their very existence, but also the physical artefacts that we call goods and the cultural artefacts we call practices, in short the artefacts of the ongoing exchange between life and value, value and life. It is life and its very many by-products that can be either good or bad, or both at once. So

one could say that it is life that brings goodness and badness into the world, and in doing so generates possibilities for value, partly within the boundaries of existing values, but also by aberrations, in something the same way that genetic variation generates new lives and from time to time, and through what might otherwise have been abnormality, such very new ways of being as amount to new species.

That sounds grandiose, but it is also and no less meaningfully or importantly, entirely trivial. When we do what we do from day to day, some of it inventive, much of it repetitive, and when we are a little lucky, we lead good lives. The flavour of those lives, in all their minutiae, is trivially distinctive, and that is what gives us reason to value them as our own, while being properly modest about their significance. We matter even as we do not matter.

Often this is quite inarticulate. It is one of those puzzles whether the facts of our lives call for valuation or whether the value of our lives calls for facts. Do we need to have an idea of something in order to be able to reflect on its worth, or is an idea something that would be difficult, perhaps impossible to comprehend without some sense of the value that it could give rise to, or as Finnis might put it, some sense of its point? A solution to the puzzle is not required. For what it's worth, my prejudice tends to run in favour of the precedence of value. There seem to be many things that we can feel and do entirely inarticulately, from simply lying in the sun, or sporting in the water, to actively engaging in complicated activities that depend for much of their value on spontaneity and improvisation. *Pace* advocates of mindfulness, it is often better not to think about things at all, and no less often better not to think about them too much. That, after all, is what other animals seem to do much of the time, and what even plants may do, as long as one is prepared, as I am, to think of plants as valuers whose valuations happen to be biologically determined, so as to

lead them to turn toward the sun, for example, and in doing so to convert the value of sunlight into the goodness of a flower.[10]

And yet of course that is only prejudice on my part. It seems to be the case that human beings are fundamentally not only valuers but pretty conceptual creatures, so that the smallest of children are as keen on naming as they are on valuing and often more accomplished at it, although not always. 'See car', I am told that I said as a very small child, looking out the window. 'See truck'. 'See ment mixer'. Naming is running ahead of value here.

All of this goes to the practice of evaluation no less than to what falls to be evaluated. There is no underlying algorithm to specify the shape of evaluation, although there are many working practices of evaluation, each of which fits, with greater or lesser success, values and practices of different kinds, while at the same time helping to characterize the culture of which it is a product, and thereby helping to contribute to that culture's worth or lack of worth, or more precisely, to the distinctive quality of its worth or lack of worth. Some cultures place great weight on the fact of embedding, using social pressure to enforce conventions across a wide range of practices, great and small. To use a trivial example once again, there is a right way to make a sauce, one will be told in such cultures, and if one presses for a reason what one will be pointed to is a custom, which will be treated as if it were a reason. There is clearly both good and bad in this. The good is surely to be found in the cultural stability that is generated thereby, in the mutual recognition of the members of that culture, and in the attendant goods that stability and recognition can give rise to. The bad lies in the rigidity, the closure, the lack of questioning, and the further consequences for the good in terms of the several losses of cultural adaptability, social mobility, accommodation of diversity, repression and unfulfilled lives.

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[10] For the full development of this thought see Timothy Macklem and John Gardner, 'Human Disability', 25 *King's Law Journal* 60 (2014).

Other cultures, such as those that are globally dominant at the moment, place great weight on abstract ideals (such as equality, democracy and human rights) that not only take the place of former embedded practices (such as tribalism, oligarchy and cultural taboos) but also treat them as both unnecessary and irrational. Trivial examples are hard to come by in this setting, because the idealizing outlook is by its very nature dedicated to denying their significance in its operation. One must ask more generally about the ways in which our lives have been shaped by commitment to an outlook that all rational beings are currently expected to share as a universal, which it is in its moral status but which it need not be in its engagement. Once again there is both good and bad in this. Our world is fluid (but then also uncertain and angst-ridden), adaptable (but shallow), open to all (but committed to no-one in particular), inclusive of all (but without the benefits that exclusiveness can give rise to), comprehensible to all (but without the benefits that the arcane can give rise to), and so on.

The contrast that I have been trying to draw is merely illustrative of certain familiar instantiations of different approaches to evaluation. Once it is recognized that evaluation is in many respects a social practice, one that itself falls to be evaluated, it becomes necessary to confront, in some detail, the different values that different practices of evaluation give rise to. Sometimes this confrontation is liable to take place at the boundaries of a culture, most obviously so in the case of embedded cultures. In fluid, liberal cultures such as ours, however, the confrontation is bound to take place at the frontiers of our individual minds (for that is the framework of responsibility that those cultures have assigned to us, so as to bring our lives as close as possible to their model of rationality), and so is bound to take shape not only in the decisions that we each make about what to think and do, but in the higher-level decisions that we make about how to decide and with what frame of reference to go about doing so, subject of

course to the claims upon us of the very many social practices in which, for all our idealizing convictions, we remain necessarily embedded, including the framework of the law and of legal system, as those things are severally and distinctively constituted and practiced in different cultures and jurisdictions.

So to take a prominent contemporary example, the practice of seeking to punish sexual transgressions through a public shaming by crowd action, rather than through the intervention of the law, represents a decision by the individuals in question to shift the framework of decision-making on this issue from the idealizing to the embedded. People do not pursue this path as a second-best to the operation of the law. Rather they pursue it because they regard it as superior, in its operations as much as its outcome. The fact that they are the authors of the criteria of evaluation, in all its detail, authors of the process of evaluation, and ultimately authors of their own remedy, is central to their movement. To put it in Dworkinian terms, they are not in any way prepared to turn to Hercules for relief. Those who believe that there is at least something to regret in this approach need to engage in the arguments about its strengths and weaknesses as a mode of evaluation. They cannot simply rule it out of court. To do so would be not merely strategically inadequate but morally unsound. Or so I am proposing.

The Problems of Integrity and of Purpose

Observations such as these have something to offer to those of us who are engaged in the practice of law, or in reflection upon that practice, in two ways. First, law is a practice of decision-making, and our understanding of it as such is necessarily affected by the views that we hold about the appropriateness of different modes of decision-making. So different legal cultures can and, as we all know, do adopt different approaches to legal decision-making, legislative and judicial, approaches that have come over time to

characterize their legal traditions, in the many ways with which scholars and practitioners, particularly those with experience of transnational and comparative law, are entirely familiar, traditions the appropriateness of which is open to evaluation in the several ways in which evaluation may legitimately take place, some of which will be regarded as alien and others as appropriate by the legal cultures in question. The appropriateness of an approach to evaluation is liable to be measured on two levels, in terms of its consonance with the local forms of legal practice, and in terms of its consonance with local practices of evaluation, some of which will in turn be distinctively legal. That consonance is possibly but not necessarily suspect. It will obscure some matters and illuminate others. So, for example, some legal cultures (indeed all legal cultures to some degree) will be embedded, so that the way that things are done around here (to adopt the common expression) is central to their operation, will regard that embeddedness as entirely appropriate, and may well further regard as appropriate embedded practices of evaluation, including those of legal evaluation. They will not necessarily be wrong in any of this, even though a good deal of it will inevitably be self-regarding, by very reason of its embeddedness. Indeed one suspects that it is almost bound to be the case that they are likely to be right about much of it, for the embeddedness of a practice is almost bound to beget a need for correspondingly embedded approaches to its understanding and critical assessment, in some respects at least.

Second, and more to the present point, the practice of reflection on the law, the practice that in academic circles tends to claim for itself the name of jurisprudence, is itself and in turn affected by the same views. For someone like Dworkin of course, these two perspectives merge into one, given his conviction that law is but jurisprudence writ small. The real strengths and weaknesses of Dworkin's account, which are to be found, on the one hand, in the idealizing picture it offers of law as something that is to be identified with its own aspiration, and on the other hand, in the gulf between that picture and the everyday reality of what aspira-

tion means on the ground, thought by thought, action by action, are ultimately located in the idea of law as integrity which, both seductively and disconcertingly, is in many ways anything but.

Recall that Dworkin begins with a distinction that he regards as essential to the interpretation and development of not only the law, but every cultural text, whether it be aesthetic or practical, namely, the distinction between the requirement of fit and the requirement of justification. That distinction is rather more odd than it treats itself as being, for in our everyday moral lives fit is rarely if ever separate from justification (we think that our clothes fit because that is part of what we think makes them look good; we speak more broadly of fit and proper reactions, in ways that make clear that those two elements are presented as going hand in hand because the role of each is in part to shape the other), while in those everyday lives justification is rarely if ever separate from fit, for tailoring is a fundamental part of the idea of justification as we practice it (we think that justification must be such as could be offered to the particular person or persons who are its subjects, so that we make sure, for example, to offer to victims justifications that take full account of their distinctive history and predicament). To seek to sever these everyday partnerships, not as a thought experiment, but as the heart of a programme for the life of the law as it should be lived in practice, as a guide to the exercise of judicial citizenship at its most admirable, is, it seems to me, to seek to take from each of those elements the crucial overtone that commends it to us as moral beings. It is to take from fit that which makes fit capable of being something worthy, while taking from justification that which makes justification something that is capable of life, in all the ways that I have sought to explore above. Let me explain what I have in mind.

In Dworkin's hands, fit becomes a matter of searching for the principle or principles that best fit the law as it currently exists, at first very locally and then as and when necessary by stepping back to more general and more comprehensive views of the law, legal

history and political history. The quest is always for fit, so that one steps back not to find a better principle but to find a better fit, officially at least. This results in satisfactory principles if and to the extent that one's legal culture is satisfactory, in its detail (for that is where the quest for fit may well stop) as much as in its broad outlines. One would need not only to be idealistic but chauvinistically so to be at all optimistic about the outcomes of such a project, for laws are the product of our politics, explicitly so in the case of statutes, implicitly so in the case of the common law, and the history of our politics, like the history of so much of human endeavour, is something that even generous observers are bound to describe as flawed at best.

Fit is not my principal topic here, and much has been said about it elsewhere, so there is no need for me to pursue its difficulties. It seems to me that there is only one slightly rueful observation that might be worth developing a little further. In articulating his picture of the process of constructive interpretation Dworkin had a choice to make in his treatment of fit. Grant for the moment and for the sake of argument his desire to approach the issues of fit and justification separately. He needed to arrive at a model of what he described as law as integrity, a model of what he took to be the proper interaction between fit and justification, justification and fit, that would be at once recognizable (so as to be plausible as a description of the fact of law as it presently exists in a particular setting which, for Dworkin, was that of the United States) and virtuous. He might have given priority to the virtuous, but he chose instead to give priority to the recognizable. One can see the large temptation in the immense capital for a progressive politics that he hoped to realize thereby, while still believing that it was a temptation that should have been resisted.

It is Dworkin's treatment of justification that is perhaps more interesting, however, because more revealing. The temptations that his account gives in to here are not the immediate ones of the potential gains to be made in terms of domestic judicial politics,

but rather the broader and more insidious (because less visible) temptations of twentieth century idealism, in which the everyday came to be archetypically regarded as politically suspect, in which the idea of modernity came to be thought of as in just opposition to ideas of custom and tradition, in a vision of moral progress. As Dworkin would have it, when more than one principle fits, as a solution to the problem at hand, the task of a court, exemplified by his ideal judge, Hercules, is to ask which of those principles would make the law the best it can be, once again stepping back as far as is needed to be able to appraise accurately the principles on offer. That principle is the law.

There are three significant difficulties in this approach, only the last of which I will dwell on. First, the identification of a principle as the one that makes the law the best it can be is possible only if the principles in question are broadly commensurable. This makes Dworkin's account of constructive interpretation something of a non-starter for value pluralists, for whom decisions involve choices of kind as well as degree. Yet there is more. In Dworkin's project, it is essential that law be self-determining, because that fact is vital to the immediate political capital that he hoped to realize for a progressive politics. The obvious problem with this proposal, and the single right answer that it is said to yield, a problem that value pluralists are particularly sensitive to but that others also share, is that in the bulk of life as we know it decision appears to be necessary to the reaching of moral conclusions. The less obvious but perhaps even more telling difficulty, to which I will return, is that the role of decision in our lives is surely morally desirable in itself. The presence of a single right answer, were it actually the fact of the matter, would erase the significance of the decision-maker, and by extension would erase the significance of all the rich rational detail that makes it possible to distinguish the moral character and function of one decision-maker from another. Remember that Dworkin's picture of constructive interpretation is not a picture that is supposed to be peculiar to the law, but to the contrary, a picture of evaluative

judgment more generally, one that explains just how the next chapter in a novel should be written, and by extension, the next chapter in a life. In both those cases it matters not to constructive interpretation just who writes the chapter: its proper content is the same. What room here for the author? What room for the fact that my life is mine? Someone else would be just as good or better at writing the script, not in all cases but surely in many.

The second difficulty with Dworkin's account of justification lies in its implicit yet powerful conservative bent. The quest for the best principle is one that explicitly canvases the world as it is and as it has been. The next brushstroke that a painter should take is one that it is to be determined by reference to every brushstroke that has ever been taken, not only as a matter of fit, but as a matter of justification. The life of an artist as so envisioned would become a matter of finding new implications for existing aesthetic values, and life in general would become a matter of discovering new, yet morally merely arbitrary, instantiations of the value of life as it has always been lived. It is possible to think of certain parts of the law (such as bills of rights) this way, because it is possible to think that the value of those particular parts of the law is to be found, to some degree at least, in their capacity to conserve certain political goods, so as to delay the amendment of those goods let alone their destruction. Yet it seems to me, and I doubt that I am unusual in this respect, that it is not at all plausible to think of life in general this way, and that it is close to impossible to think of art this way, for to do so is to strip out from each of those things the value of creativity and the significance of voice.

That brings to me to what I see as the final and most troubling difficulty in Dworkin's account of justification which, ironically, is the obverse of what I take to be its chief attraction for idealists. To approach life, even the life of the law, in terms of integrity, so as to engage in the justification that constructive interpretation calls for, is to enter into a relationship with the moral that takes the very life out of the moral. As I have sought to put it above,

value comes to life only in the hands of valuers. That is just what the world has to offer to morality. It is our existence, and that of other valuers, that provides the occasion and the opportunity for morality to inhabit the world other than as a potentiality, and more than that but also consequently, that gives morality reason and opportunity to grow, develop and evolve, through engagement with the facts of existence, large and small.

Decision is not an affliction, something that we would avoid if we could. It is the stuff of life. It is through our decisions, in the nuanced sense of decision that I have sought to describe above, the sense that treats our reactions as among our actions, that we articulate our moral character, and so describe our moral life. Without decision we would lack a sense not only of authorship but of predicament, and without predicament it is hard to see how there could be any such thing as responsibility, if responsibility is, as I take it to be, the account that is to be given of our engagement with value. It is the exercise of this responsibility in our thoughts and in our actions, through the authorship of our destiny, individual and collective, that enables us to bring goodness into the world (as well as badness, when we exercise responsibility badly). We are all too familiar with the fact that our existences are very often, and for the pessimistic, characteristically, a falling away from value, but we are much less attentive to the corollary, that it is those same existences that give rise to the realization and enhancement of value. That is just what makes the world a beautiful place, to the extent that it is so. Otherwise the beauty and the place would never be in a position to come together, and know one another.

All this is as true for lawyers as it is for other human beings. To be an actor in a legal system is to play a role of some kind in the collective exercise of responsibility for a certain strand of social life, that of the recognition, maintenance and development of a set of norms that is sufficiently distinct from other norms, in its origins and status, to enable it to serve purposes that would be

served differently, perhaps less well, perhaps not at all, by rival sets of norms. In the exercise of this role it is the quality of decision that makes legal norms good and bad, and that quality is a product of moral perceptiveness in decision-making, fine-grained and large. The balance that is struck between those two extremes of granularity (and everything in between them), from issue to issue, decision to decision, comes over time to characterize certain cultures and sub-cultures, social, political and legal, and those institutions that contribute to their development, from legislatures to courts, from lower courts to higher ones, from legal actors to legal critics.

Without the role of decision there would be no American legal system for Dworkin to speak to and explain, or for the rest of us to compare and analogize to our own legal systems. That is what the aspect of fit, as Dworkin describes it, implicitly recognizes but explicitly misrepresents, by removing the question of fit, and responsibility for its exercise, from the question of justification, where in fact it performs the vital task of humanizing the moral and making it our own, and assigning it an independent and isolated role that has the effect of valorizing culture without attending to the reasons for its value and disvalue. As Dworkin presents it, constructive interpretation, in law and in life, makes our moral world smaller and more self-regarding than it ought to be, while at the same time and by the same token making us passive rather than active participants in it. Surely Dworkin's own remarkably inventive and distinctive intellectual legacy, in and of itself, gives the lie to this view. Is it at all possible to believe that the various chapters of *Law's Empire*, for example, the ideas developed there, and the potent vision that sustained them, did not ultimately depend on the vitality, fluency, and creativity of Ronald Dworkin himself? Do we not have him to thank for them, both for better and for worse? Did Dworkin really believe, having granted equal competence, absence of agenda, and an unwillingness to act as his *amanuensis* (for anything else would not amount to constructive

interpretation as Dworkin describes it), that John Finnis could have alternated with him in the writing of that book to much the same effect? Or more precisely and more fairly, that some other writer, a literary Hercules, could have rendered the ideas present there at least as well and probably better? And if this last is something that Dworkin could possibly agree to, as he might have done if he was prepared to think of his life as an approach to the ideal, should the rest of us concur, or should we think that there was something quite special about Ronald Dworkin, something that infused his work, and that would not have existed in quite the way that it did but for the various accidents of fortune that came to constitute his mind? What reason otherwise for relative strangers such as myself to mourn his passing?

A couple of concluding observations. I have consistently spoken of courts generally but this is to fail to give weight to the fact that Dworkin's focus is on appellate courts, which are institutionally something of an ambiguous case. The ambiguity makes appellate courts rather more plastic in the hands of their interpreters than are some institutions, and that may have suited Dworkin. It does not alter the fact that appellate courts, no less than trial courts, are attentive to questions of fit in the patterns of their justifications. Appellate courts derive the fine-grained aspects of their decisions from the legislature on the one hand and from trial courts on the other. Two things follow from this. First, while the public face of appellate courts emphasizes their distance from fine-grained factual determinations, as confirmation of their supervisory rather than competitive institutional role, the fine-grained remains present in their judgments, albeit derivatively so. One can see this in the care with which appellate courts grant leave to appeal (to the extent that they control their own dockets), so as to make sure that the large national issues that they are asked to determine are grounded on what the courts regard as good facts. Second, both the public face and the actual decision-making of appellate courts constitute a shifting frontier of attention to the significance of different approaches to decision-making, a frontier that is as con-

tentious as is the political culture in a given society. One can see this in the debates that take place about the attention that is paid, or ought to be paid, by those courts to the law of other jurisdictions and to international law in the development of the constitutional cultures of their own jurisdictions. In Canada this plays out in terms of the attention that ought to be paid to decisions taken under the American Bill of Rights; in the United States it plays out in terms of the attention that ought to be paid to certain decisions by international courts. To notice this is part of what it means to notice, correctly, that the appellate courts are fundamentally political (albeit not party political), and locally so.

Second, while I have focused on Dworkin in my comments, because the architecture of his theory is so explicitly isolating and purifying, the points that I have been seeking to make are in no sense *ad hominem* ones. They are also an issue for legal positivism, where they gain their purchase in debates about the purpose of law. To assign a purpose to a practice, whether accurately or inaccurately, is to impose a requirement of fit on the practice, archetypically a more or less conservative fit, in which the practice is expected to be something that it has always been, rather than to recognize it as open-ended, as practices are in fact more or less bound to be in their inception, maintenance and development, simply by reason of their mortality: new aspects of the practice, new occasions for value, and sometimes even new values being born in the shape of new or altered purposes for the practice, even as old aspects of the practice die by reason of their relative neglect, whether out of cultural restlessness, or a shifting sense of cultural relevance as other connected practices themselves alter, in mutually informing patterns, sometimes to be remembered and perhaps revived in one form or another, sometimes to be forgotten.

It is a notable feature of Joseph Raz's treatment of law and legal system that he never suggests that the purpose of law is to serve

as an authority. Instead he explains the ways in which compliance with the law, the ways in which doing or refraining from doing something just because the law has told one to, may be rational, so that it may be rational to make laws and to observe laws for the sake of the value of the authority they provide. That is to take no official position upon, and so leave open, the question of what values inspired the creation of legal practice (assuming that such a question could have any kind of determinate answer) and in turn the question of what values the practice might be capable of giving rise to, now or in the future. Those are questions to which answers can be given only ever provisionally, and only through the constantly shifting shape of our social lives.

The Problem of our Times

The currents of this debate, or something like it, seem to me to be particularly active at the moment, as much of the world veers between the enlightened and the atavistic, as proper frameworks for sound collective decision-making. Just where those currents might lead us is as yet quite unclear, and likely to remain so, for the small fragments of social history in which we are embedded, and in which we are reasonably well versed, are compatible with many different larger histories, a good number of which remain entirely plausible prospects at the moment, and are likely to do so until they are taken over by a new set of long-term uncertainties. That means that, contrary to the apparent spirit of much of this paper, any decisions that we might currently make will be only contingently connected to those larger histories, and in ways that are likely to surprise and perhaps even dismay us. I say contrary to the apparent spirit just because in truth one of the implications of due attention to the fine-grained is that larger histories ought to be accepted as matters of contingency. To attempt to speak to them directly would be to open up possibilities for error that those committed to the fine-grained seek to avoid. Nevertheless it is always a good idea even for the most locally minded of us to

have one eye to the horizon, and it is part of the purpose of this paper to suggest modest ways in which at least some aspects of the standardly accepted contrast between the claims of modernity and those of its atavistic critics, between the ideal and the everyday, might be illuminated and perhaps even constructively muted, in a manner that we all already recognize and have a decent working understanding of.

So there are many good ways to approach a situation such as that which arose in *Riggs*, many attractive ways in which to apply the claims of the general principle that no-one shall profit from his own wrong. That principle could not be brought to bear other than by attention to the nature of the profit in the case at hand, and the character of the wrong. Suppose the wrong was a mercy killing of one spouse by the other. Suppose further that although well intentioned the mercy killing was unjustified. The ending of the life in such a case might have been driven by the same quality of tenderness for the welfare of the other that animated the victim's testamentary provision, notwithstanding its wrongfulness. Courts since *Riggs* have gone both ways on the issue, not because they took different views of the general principle, but rather because they took the view that the principle gained life through its application to the facts, to which it was bound to respond as part of its being. And yet none of the facts to which the principle was called upon to respond would have any purchase but for the presence of the general rule and the moral perception that it embodied. That is why (or at least part of why) decision is so difficult and deeply resistant to schematization (resistant because most schematization is arbitrary, albeit that it may quite possibly give rise to value after the fact), but it is also why the exercise of decision, and the consequences of that exercise, can be so valuable.